Supreme Court, U. S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1109

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA, *ex rel.*
CHARLES H. PAYNE, etc., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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February 7, 1978

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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IN THE

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No.

SHEARN MOODY, JR.,
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v.

STATE OF ALABAMA, *ex rel.*
CHARLES H. PAYNE, etc., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The petitioner Shearn Moody, Jr., prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama, entered in this proceeding on September 9, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 351 So.2d 552, and is reprinted in the Appendix hereto, p. 2a, *infra.*

The order of the Circuit Court of Jefferson County, Alabama, denying leave to file a federal antitrust complaint in

a federal court, is unreported; it is reprinted in the Appendix hereto, p. 9a, *infra*. No opinion accompanied that order of denial.

JURISDICTION

The judgment of the Supreme Court of Alabama, which denied a writ of mandamus to review the refusal by the Circuit Court to permit a federal antitrust action to be filed in a federal court, was entered on September 9, 1977. A timely motion for rehearing was entertained and denied on November 10, 1977. See Appendix hereto, p. 1a, *infra*. This petition for certiorari is being filed within 90 days following the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a state court is wholly without power, by virtue of the Supremacy Clause of the United States Constitution, to enjoin or to refuse to permit the filing of an *in personam* federal antitrust suit in a federal court on the ground that (a) a corporate receivership proceeding pending in the state court is considered an *in rem* proceeding, and (b) the filing of the antitrust suit would allegedly interfere with, delay and eventually stop the state receivership proceeding.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article VI, second clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

The narrow but important issue in this case arises out of the following sequence of events:

(1) In 1972, on complaint of the State of Alabama, the Empire Life Insurance Company of America [hereinafter Empire]was placed in receivership, being allegedly impaired and insolvent. Empire was also placed in ancillary receiverships in Arkansas, Montana and Texas. In 1974, the receivership court in Alabama determined that Empire was insolvent and that reinsurance of the Empire policies was necessary to protect the interests of the policyholders. The Empire receivership is now an accomplished fact; its primary assets have been transferred to the Protective Life Insurance Company, which has reinsured the Empire policies.

(2) The petitioner herein, Shearn Moody, Jr., was allowed to intervene in the Alabama receivership proceedings in his capacity as principal stockholder and former chairman of the board of Empire. He has consistently and vigorously protested the receiverships and the dissolution of Empire, and has contended that the assets of Empire have been grossly undervalued to make it appear insolvent.

(3) On January 5, 1975, on application of the Alabama receiver [John G. Bookout, who was also the state commissioner of insurance], the receivership court in Alabama issued an injunction directed generally to all present and former policyholders, stockholders and agents of Empire and in particular to the petitioner Shearn Moody, Jr. Such persons were restrained, unless they "shall first receive the prior ap-

proval of this Court," from filing or aiding in the filing of any lawsuit, complaint or legal claim, or any amendment thereto, "in any court wheresoever located on behalf of any party whatsoever" that in any way named or related to (a) the Alabama receiver, (b) the ancillary receivers in the other states, (c) the affairs of Empire, including its receivership and its reinsurance requirement, or (d) any judicial decree implementing the receivership. This injunction was approved by the Supreme Court of Alabama in *Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So.2d 73 (1976), at least as it was applied there to restrain suits arguably to remove assets from the *res* of the Alabama receivership proceedings.

(4) In June of 1975, Moody requested permission from the Alabama receivership court to file an amended counterclaim in a civil action then pending in the United States District Court for the Northern District of Texas. The receivership court granted such permission. But the federal court thereafter denied leave to amend the counterclaim, presumably because such an amendment might delay trial of the action. Significantly, this proposed amendment to the counterclaim would have set forth precisely the same federal antitrust cause of action as that now sought to be filed as an original action.

(5) In May of 1976, the petitioner Moody sought leave of the receivership court to file the federal antitrust claims in the form of a new or original complaint, which was to be filed in the federal district court in Texas. Named as defendants in the proposed complaint were (a) the State of Texas,[1] (b) the Alabama receiver, Mr. Bookout, (c) the former Arkansas insurance commissioner, Mr. Horne, (d) the former Texas insurance commissioner, Mr. Cotten, and (e) the present Arkansas insurance commissioner, Mr. Sykes.[2]

[1] In June of 1975, the Governor of Texas approved a concurrent resolution of the Texas legislature that granted permission to Moody to sue the State of Texas for any wrongful acts committed by state agents and officials during the course of the Empire receivership proceedings. Texas House Concurrent Resolution No. 118, approved June 19, 1975.

(6) The proposed antitrust complaint recited that the action arose under Section 1 of the Sherman Act, 15 U.S.C. §1, and under Section 4 of the Clayton Act, 15 U.S.C. §15, as well as under the laws of Texas for tortious interference with the business relationship between Moody and Empire. The named defendants were alleged to have entered into various illegal schemes and conspiracies among themselves and others to use the powers of their respective public offices (a) to wrest control from Moody of the management of Empire's affairs, (b) to interfere with Moody's various business relationships with Empire, (c) to prohibit Moody from conducting business through Empire, (d) to place Empire in receivership, (e) to prevent its rehabilitation, (f) to destroy Moody's insurance business and to eliminate and destroy Empire as a viable entity competing in the insurance business in Alabama, Texas, Arkansas and elsewhere. All of these illegal actions were alleged to have been done for the defendants' own personal and political purposes and profits. The complaint further asserted that Moody had been damaged in an amount in excess of $10,000,000, and that he was entitled to treble damages pursuant to Section 4 of the Clayton Act.

(7) On November 27, 1976, the Alabama receivership court denied Moody's motion for permission to file this an-

[2] The proposed complaint would have been captioned *Shearn Moody, Jr. v. The State of Texas, John G. Bookout, Alan W. Horne, Clay Cotten, and A. Gene Sykes.*

trust complaint. See Appendix hereto, p. 9a, *infra.* No reasons were given for the denial; nor was any reference made to the earlier permission given to file the antitrust claims as an amendment to the counterclaim in the same federal court in Texas.

(8) On September 9, 1977, the Supreme Court of Alabama denied mandamus and affirmed the action of the receivership court in denying leave to file the federal antitrust complaint. See Appendix hereto, p. 2a, *infra.* The court expressly considered and rejected petitioner's claim, grounded on the Supremacy Clause of the United States Constitution as interpreted in *Donovan v. City of Dallas,* 377 U.S. 408 (1964), that the receivership court was completely without power to restrain access to a federal court to file an *in personam* federal antitrust suit for money damages. Relying upon its earlier opinion in this proceeding, *Moody v. State ex rel. Payne,* 295 Ala. 299, 329 So.2d 73 (1976), the court deemed the receivership proceeding to be *in rem* in nature, thus bringing to the fore the exception mentioned in *Donovan* to the effect that a state court having custody of property has exclusive jurisdiction to proceed and to enjoin the institution of any other court action that might interfere with or embarrass the *in rem* action. The proposed federal antitrust action was interpreted as being of that nature, as being "nothing more than another ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding."

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the Supremacy Clause of the Constitution, as well as with the implementing principles announced by this Court in *Donovan v. City of Dallas,* 377 U.S. 408 (1964), and *General Atomic*

Co. v. Felter, 434 U.S. ____, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). That conflict expresses itself in several ways:

I

The basic doctrine stemming from the *Donovan* and *General Atomic* decisions is that "state courts are completely without power to restrain federal-court proceedings in *in personam* actions." 377 U.S. at 413; 98 S.Ct. at 78. The right to litigate in federal courts is granted by Congress and cannot be diluted or taken away by state courts. The Supremacy Clause dictates that proposition.

The decision below cannot be squared with this constitutional doctrine. The Alabama Supreme Court has ruled that state courts do have power to restrain the institution in a federal court of what plainly is an *in personam* antitrust suit. Such power has been asserted despite the fact that Congress has conferred exclusive jurisdiction on the federal courts to consider and resolve *in personam* damage actions under the Sherman Act and the Clayton Act, actions which could not be brought or entertained in the Alabama courts. Such a destruction of a federal cause of action, such a denial of access to the federal courts to implement the public policies underlying the federal antitrust laws, can only exacerbate the conflict with the basic doctrine announced in the *Donovan* and *General Atomic* decisions.

II

The decision below further conflicts with this Court's announced "exception" to the basic rule enunciated in *Donovan* and *General Atomic.* That "exception," into which the court below sought to fit this case, states that an "exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem,*" and that "the state or federal court having custody of such property

has exclusive jurisdiction to proceed." 377 U.S. at 412. Deeming the Empire receivership to be an *in rem* proceeding in the state court, the Alabama Supreme Court has leapt to the conclusion that the state court may act to protect and preserve its *res* by enjoining the institution of an *in personam* federal court action.

That conclusion misreads the nature and meaning of the so-called "exception." In the principal case exemplifying the "exception," *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939), this Court stated that

> ". . . it is settled that where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other."

In other words, the "exception" exists only where both the state and the federal causes of action are *in rem* in nature, both seeking to possess and control the identical *res*. The "exception" is totally inapplicable where one of the proceedings is *in rem* and the other is *in personam*. That was precisely the situation encompassed in *Markham v. Allen*, 326 U.S. 490, 494 (1946), holding that where a state court has first acquired jurisdiction over a *res*, a federal court may still freely "exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court."[3]

In short, the *in rem* nature of the Alabama receivership proceeding does not entitle the state court to enjoin the institution of an *in personam* federal court action. In that situation, there is no likelihood of an unseemly conflict between state and federal courts over possession of the same *res;* their judgments expend themselves upon totally different legal interests – i.e., the property interests and the personal interests. And so in this case, any determination of the antitrust defendants' personal liability under the federal antitrust laws could have no effect upon, and could not deplete, the Empire assets possessed by the state court. It matters not that some of the parties and many of the events involved in the federal antitrust complaint are the same as those involved in the state receivership proceeding. What is important is that the ultimate judgments of the two courts would be quite consistent with each other, neither one affecting the interests adjudicated by the other.

The fact that the "exception" was not designed to be applied in this context suggests the totality of the conflict between the decision of the Alabama court and the decisions of this Court in *Princess Lida*, *Markham*, *Donovan* and *General Atomic*.

---

[3] In the converse situation, where an *in personam* action is first brought in a federal court to determine rights in a trust, the Court has held that the *in personam* nature of that action prevents the federal court from enjoining a subsequent *in rem* proceeding in a state court in a state where the trust property is located. *Mandeville v. Canterbury*, 318 U.S. 47 (1943).

III

The Alabama court sought to justify denying access to the federal courts by reference to the harassment, interference, delay and eventual stoppage of the state receivership proceedings that might ensue were the federal court action allowed to proceed. Such an approach to the problem only brings the Alabama decision into more conflict with the *Donovan* and *General Atomic* decisions.

As was noted in the *General Atomic* per curiam opinion, 98 S.Ct. at 79, *Donovan* presented "as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings . . . [and] the pendency of the federal action had the effect of rendering the state-court judgment ineffective . . . [but] We nevertheless overturned the state-court injunction." The answer to the Alabama court's concern with possible interference with the state receivership proceedings lies in this Court's proclamation that "Federal courts are fully capable of preventing their misuse for purposes of harassment" or any other projected kind of interference. *General Atomic*, 98 S.Ct. at 79.

Like the merits of a federal cause of action, the possibility of federal court interference with state court proceedings is not to be weighed in assessing a state court's power to enjoin *in personam* federal proceedings. The Alabama court's reliance on that potential is thus at war with the *Donovan* and *General Atomic* rulings of the Court. Perhaps even more significant is the conflict between the ruling below and the Supremacy Clause's guarantee of free access to the federal courts to seek redress of one's federal-type injuries. That conflict even extends to the First Amendment, which likewise guarantees free access to the courts as a component of the right to petition for redress of grievances. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964).

CONCLUSION

The summary reversal of the state court injunction in the *General Atomic* case underscores this Court's continuing concern with the efforts of some state courts to block access to the federal courts to implement *in personam* federal causes of action. The instant case is but another troubling example of this kind of avoidance of the Supremacy Clause principles. The challenge here made to those principles should not be ignored.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 1978

APPENDIX

Re: SC 2265
Shearn Moody, Jr., Appellant vs. State Ex Rel. Payne, etc., Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * * * * *

Application for rehearing overruled. No opinion written on rehearing.

* * * * * *

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

11-10-77

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1977

Shearn Moody, Jr.

SC-2265 v.

State of Alabama, ex rel. Charles H. Payne, etc., et al.

Appeal from Jefferson Circuit Court

EMBRY, JUSTICE

This is an appeal, or in the alternative a petition for writ of mandamus, to review an order entered by the Circuit Court of Jefferson County denying Shearn Moody's motion for permission to file a complaint in the United States District Court for the Northern District of Texas. We deny the writ.

An excellent history of this controversy is reported in *Moody v. State, ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). There we quoted, and upheld, the circuit court's order and injunction of 6 January 1975; the crux of this appeal. That order enjoined Moody, and others, from filing any lawsuit, complaint, legal claim, or amendment thereto, which related to the receivership of Empire Life Insurance Company of America without the prior approval of the circuit court. Only a chronological summary of the events after the issuance of the 6 January 1975 injunction is needed for an understanding of this opinion.

On 23 June 1975, Moody requested permission from the circuit court to file an amended counterclaim in a civil action then pending in the United States District Court for the Northern District of Texas. Permission was granted 7 July 1975, however, Moody was denied leave to amend his counterclaim by the United States District Court. Thereafter, on 19 May 1976, Moody moved the circuit court for permission to institute a new suit in the United States District Court based upon the same claims asserted in the amended counterclaim. Moody's motion was denied without prejudice by the circuit court on 19 August 1976.

On 28 September 1976, Moody filed a pleading in the circuit court entitled "Motion for Permission to File Complaint," which renewed his request to file an independent action in the federal district court. The proposed complaint attached to that motion asserted a claim based on a violation of the Sherman and Clayton Anti-Trust Acts against the State of Texas, John G. Bookout, Alan W. Horne, Clay Cotten, and A. Gene Sykes. The circuit court, on 29 November 1976, denied that motion. Moody appeals and in the alternative prays for the writ of mandamus; both designed to review the propriety of the order denying his motion to file his action in the federal district court in Texas.

The order denying Moody's motion is not an appealable one for the same reasons the order in *Moody v. State, ex rel. Payne*, SC-2215 (Ms.), released contemporaneously with this opinion, is not. Mandamus is the proper method of review of the order since Moody seeks to compel the trial judge to permit him to file the Texas federal court action. The order falls within that category which are interlocutory in nature and as to which an adequate remedy is not available on appeal; e.g. denying a motion to strike a demand for jury trial. See *Whitman v. Mashburn*, 286 Ala. 209, 238 So. 2d 709 (1970).

Moody says the issue presented for review is whether an Alabama court may enjoin a party from instituting an action in a federal court asserting a claim under a federal statute. We would state it as whether: under the circumstances of this case; under the Constitutions of the United

States and Alabama; and the federal and Alabama law, the trial court had the authority to prohibit Moody from filing a complaint in federal court?

For an overview of other aspects of the liquidation proceedings involving Empire Life Insurance Company see *Moody v. State, ex rel. Payne*, 344 So. 2d 160 (Ala. 1977), and *Ex parte Moody*, 11 ABR 2192 (19 Aug. 1977).

Moody says that under the state and federal constitutions he has an unfettered right to file suit in federal court because his claim was based upon violation of the federal anti-trust laws. He says his right cannot be abrogated by a state court and cites *Donovan v. Dallas*, 377 U.S. 408 (1964), in support. *Donovan* was the subject of much discussion in *Moody v. State, ex rel. Payne*, supra, wherein we recognized as the law, the proposition that state courts are completely without power to restrain a federal court from proceeding with an *in personam* action. Moody argues that *Donovan* supports his position because the proposed action which he sought permission to file is a claim for money damages under the anti-trust laws; therefore, purely *in personam* in nature. Moody says further that the receiver and the receivership estate are not involved. We disagree.

In *Moody*, we also quoted the exception to the rule as stated in Justice Black's opinion in *Donovan:*

> "* * * An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court had said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. * * * " 295 Ala. 299, 307.

We unequivocally held in *Moody* that the Empire receivership was an *in rem* or *quasi in rem* proceeding and the injunction of 6 January 1975 was a proper exercise of the circuit court's power. We adhere to that holding.

Hence, the sub-issue raised is whether Moody's proposed claim to be filed in federal court involved the Empire receivership proceeding. Again we answer in the affirmative. Our conclusion is drawn from a careful reading of Moody's proposed complaint. It names as defendants John G. Bookout, who was the receiver of Empire in Alabama until he was succeeded by Charles H. Payne; Alan W. Horne, former insurance commissioner of Arkansas; Clay Cotten, the insurance commissioner of Texas; and A. Gene Sykes, present insurance commissioner of Arkansas. The State of Texas was named as defendant to the extent its former Attorney General Martin, Clay Cotten, and other agents of the state were acting within the scope of their authority. All of the alleged defendants were named in the 6 January 1975 injunction either personally or in a capacity related to the Empire receivership.

Although Moody's proposed complaint alleges the action arises under the federal anti-trust laws, the complaint centers around an alleged conspiracy of the named defendants. Paragraph four of the complaint states:

> "4. Defendants State of Texas, Bookout, Horne, Cotten, and Sykes have entered into one or more illegal plans, compacts and conspiracies and courses of conduct between and among themselves and one or more of the following persons: Crawford Martin, Attorney General of the State of Texas, Charles E. (Buster) Hunter, former Deputy Insurance Commissioner of the State of Alabama, Richard Marcus Goode an insurance company broker, Stuart Hopps, an insurance company broker, and other unnamed defendants presently unknown to Moody, secretly

and illegally, to use the powers of their respective offices, in abuse and in excess of their authority, to wrest and to separate control of the management of the affairs of Empire from Moody; to interfere with Moody's relationship with Empire as controlling stockholder, Chairman of the Board and President of Empire; to prohibit Moody from conducting business through Empire; to place Empire into receivership; prevent its rehabilitation; force its reinsurance and to suppress, eliminate and destroy Moody in the insurance business and Empire as a viable entity competing in the insurance business in Alabama, Texas, Arkansas and elsewhere all for Defendants own personal and political purposes and profits. Alternatively, the above-mentioned acts and practices in restraint of trade and for the purpose of interfering with business relationships of Moody were engaged in by the above-named Defendants, individually and said defendants were aided and abetted in such acts and practices by other named Defendants and additional parties not named as Defendants. The illegal plans and actions of Defendants were not discovered by Moody until after June, 1974. The above-mentioned acts of the named Insurance Commissioners were conducted under color of their office as Insurance Commissioners but known by said Defendants to be illegal and outside the scope of the authority granted by their office and were undertaken intentionally, knowingly and willfully, without substantial justification and with intent to interfere with the business relationship between Empire and Moody and with intent to force Moody and Empire out of the insurance business in Defendants' states."

Paragraph five of the complaint concerns an important aspect of any receivership proceeding – valuation of an asset. It reads:

> "5. The background of the above-described conspiracy and actions of Defendants is as follows: From 1964 to 1968, Empire, with its principal asset as 2/5 of the 1/8 life estate interest in the Libbie Shearn Moody Trust, acquired and merged or reinsured into it the following companies in states outside of Alabama: Consolidated American Life Insurance Co., Chicago, Illinois (1964), Empire Life Insurance Company of America, Little Rock, Arkansas (1965), National Empire Life Insurance Co., Dallas (1968), American Trust Life Insurance Co., Wichita Falls, Texas (1968), Capital Security Life Insurance Co., Springfield, Illinois (1968), and Centennial Reserve Life Insurance Co., Great Falls, Montana (1968). Pursuant to an examination conducted by the Insurance Departments of the States of Texas, Arkansas and Alabama, as of December 31, 1965, the Moody Trust interest valuation of $14,213,440 had been expresssly approved by the Insurance Commissioners of Arkansas, Texas and Alabama. In the majority of the mergers and reinsurances engaged in by Empire in 1964 through 1968, this trust interest valuation again was expressly approved and ratified by the Insurance Commissioners of the States of Arkansas, Texas and Alabama. For example, in 1968, Empire reinsured American Trust Life Insurance Company and this reinsurance was approved by Defendant Cotten in 1968 after a hearing in which Cotten found that Empire was in fact solvent, which finding was predicated upon the aforementioned $14,213,440 valuation."

Considering the proposed complaint, and the parties sought to be impleaded as defendants, there is no question the action inextricably involves the Empire receivership.

Viewed as a whole, the picture is clear that the proposed action was nothing more than another ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding. As such, the proposed action falls within the operative ambit of the 6 January 1975 injunction; thus the circuit court's order denying Moody's request cannot be considered erroneous or an abuse of discretion.

For the reasons stated herein, we uphold the circuit court's order denying Moody's request to file an independent action in federal court.

WRIT DENIED.

Torbert, C.J., Bloodworth, Jones and Almon, JJ., concur.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 9 day of Sep. 1977.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT
OF ALABAMA
EQUITY DIVISION

CASE NO. 171-687

[Filed Nov. 29, 1976]

STATE OF ALABAMA, EX REL
JOHN G. BOOKOUT, COMMISSIONER OF INSURANCE,
Plaintiff,

v.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA, an Alabama Corporation,
Defendant,

AND SHEARN MOODY, JR.,
Intervenor.

ORDER

On September 28, 1976 the Intervenor, Shearn Moody, Jr., filed a "Motion for Permission to File Complaint." The Court has heared statements and arguments of Counsel in support of said motion and

Accordingly, it is considered, ordered, adjudged and decreed by the Court as follows:

ONE: That the Motion for Permission to File Complaint heretofore filed by the Intervenor, Shearn Moody, Jr., is hereby denied.

DONE and ORDERED this the 29th day of November, 1976.

/s/ W. G. Barber
CIRCUIT JUDGE, In Equity Sitting

Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1109

SHEARN MOODY, JR.,
Petitioner,

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE,
Commissioner of Insurance and Receiver of Empire
Life Insurance Co., of America
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

RELATED LITIGATION

The opinion of the Supreme Court of Alabama is reported at Ala., 351 So. 2d 552.

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Moody v. State, ex rel Payne, Ala., 344 So. 2d 160 (1977);

Ex Parte Moody, Ala., 351 So. 2d 538 (1977);

Moody v. State, ex rel Payne, Ala., 351 So. 2d 547 (1977);

Moody v. State, ex rel Payne, 520 S.W. 2d 452 (Tex.Civ.App. - Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W. 2d 366 (Tex.Civ. App. - Austin 1973);

Moody v. Crook, 520 S.W. 2d 958 (Tex.Civ.App. Austin 1975);

Moody v. Jones, 518 S.W. 2d 536 (Tex.Civ.App. Austin 1975);

Day v. Jones, 489 S.W. 2d 368 (Tex.Civ.App. - Austin 1972, n.r.e.);*

Moody v. Moody Nat'l Bank, 522 S.W. 2d 710 (Tex.Civ.App. - Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W. 2d 158 (Tex.Civ.App. - Waco 1976 writ ref'd n.r.e. 1977).

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*Indicates denial of review by the Texas Supreme Court upon finding of "no reversible error"(n.r.e.).

Other petitions of related cases reaching this Court are:

No. 77-428 (denied December 12, 1977, rehearing denied February 21, 1978)

No. 76-1845 (denied October 3, 1977, rehearing denied November 28, 1977)

No. 77-873 (pending)

No. 77-571 (denied December 12, 1977, rehearing denied January 16, 1978)

No. 77-1041 (pending)

QUESTION PRESENTED

Under the circumstances of this case and under the Constitution of the United States and Alabama and the federal and Alabama Law, did the state trial court in Alabama have the authority to prohibit Moody from filing a complaint in a federal court?

STATEMENT OF THE CASE

1. Background of Receivership.

On June 29, 1972, Empire Life Insurance Company of America (Empire) was found to be impaired and insolvent and placed in Receivership by the Circuit Court of Jefferson County, Alabama. Empire was also placed in ancillary receivership in the States of Arkansas, Montana and Texas. The president, chairman of the board of directors and principal stockholder of Empire was Shearn Moody, Jr., (Moody).

Following an extensive hearing in which Moody was represented as a party litigant, the receivership court determined Empire to be impaired in excess of ten million dollars and insolvent in excess of six million dollars and ordered the Company liquidated and the active insurance business reinsured into Protective Life Insurance Company. This case was upheld in *Moody v. State, ex rel Payne,* Ala., 344 So. 2d 160, (1977) cert denied *Shearn Moody, Jr., v. Charles H. Payne,* etc. U.S. (Case No. 77-428).

2. Background of Injunction.

Petitioner, Moody, states that he has:

> " consistently and vigorously protested the receiverships and the dissolution of Empire, and has contended that the assets of Empire have been grossly undervalued to make it appear insolvent."

The concession by Moody is perhaps the most profound understatement contained in any application ever made to this Court.

The facts leading up to the January 6, 1975 order of the trial court enjoining Moody from filing the complaint are best stated by the Supreme Court of Alabama speaking through Mr. Justice Merrill, in *Moody v. State, ex rel Payne,* 295 Ala. 299 (pp 302-304), 329 So. 2d 73 (1976). A shorthand rendition of those facts are as follows:

On December 27, 1974, the Receiver of Empire, Commissioner of Insurance, John G. Bookout, applied for and received a temporary restraining order against Moody and others. To supplement the application, Bookout attached affidavits concerning the multiplicity of litigation instituted by Moody following the court devaluation of Empire's principal asset and the order of liquidation and reinsurance. A hearing on that application was set for January 6, 1975.

At the hearing on January 6, 1975, Commissioner Bookout testified that he had been subjected, both as Receiver of Empire and individually, to numerous law suits and proceedings filed by Moody or Moody Attorneys all of which related to the Empire receivership and were filed subsequent to the plenary hearing conducted by the receivership court in April of 1974 culminating in an order of insolvency and reinsurance on June 14, 1974. Bookout also testified in detail as to some seven separate actions then pending or filed by Moody or instituted by Moody.

Commissioner Bookout further testified as to a threat made by Shearn Moody in the following terms:

> "(Shearn Moody) said to me, in words to this effect that Mr. Bookout, we are just getting started on you. "I intend to sue you personally. My actions will be of a personal nature against you to carry over after you

have left the office (of Commissioner of Insurance).***we killed Crawford Martin and somebody else,***he died with a heart attack the day after he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us fifty years." (295 Ala. 304)

Following the hearing, the Court issued an order restraining Moody and others from filing any lawsuit, complaint, legal claim or amendment thereto which related to the receivership of Empire Life Insurance Company of America without prior approval of the receivership court. This injunction was upheld by the Supreme Court of Alabama in *Moody vs. State, ex rel Payne,* supra. See also, *Ex parte Moody,* Ala., 351 So. 2d 538 (1977). Note also Title 28A, Section 624 (2) Code of Alabama Recompiled 1958 (Section 27-32-5, Code of Alabama 1975).

3. Present Litigation.

On June 23, 1975, Moody requested permission of the Circuit Court to file an amended counter-claim in a civil action then pending in the United States District Court for the Northern District of Texas. Permission was granted July 7th, 1975. However, Moody was denied leave to amend his counter-claim by the United States District Court.

Following a delay of almost a year, Moody on May 19, 1976, requested permission of the receivership court to institute a new suit in the United States District Court in Texas based upon the same claims asserted in the proposed amended counter-claim. This request was set for hearing on July 19, 1976. Although three Attorneys appeared for Moody, none mentioned the pending request, and it was subsequently denied on August 19, 1976. (Rpp. 25-27).

Thereafter, on September 28, 1976, for the third time, Moody sought permission to file another action against the named parties. After hearing argument of Moody's counsel in support of the motion, the Circuit Court entered an order of denial on November 27, 1976. Moody presented no evidence to the Court, made neither a showing of good faith, nor a showing that the requested filing of the new complaint was not purely and solely for the purpose of further delay and interference with the res of the receivership estate.

ARGUMENT

I. DOCTRINE OF CONCURRENT JURISDICTION — THE EXCEPTION.

The validity vel non of the injuction order of January 6, 1975, is not in question in this case. Rather, it is the application of that injunction to the circumstances at bar.

To say that Moody's track record is appalling is an understatement. If ever a case deserved an injunction both *in personam* and *in rem*, this case deserves that injunction.

The Allmon case referred to in the background and other related decisions was an attempted civil rights action brought by a policyholder of Empire one Willie Allmon, at the instigation of Moody. It was this action that finally led to the injunction and to subsequent contempt orders. Moody in Allmon attempted to use the vehicle of civil rights to relitigate the entire receivership proceedings and wrest the control of the res from the receiver and the receivership court. The United States District Court for the Middle District of Alabama looked beyond the claim of civil rights to the purpose of the litigation and declined to interfere with the receivership court's control of the estate.

The leading case on the subject of concurrent jurisdiction of the state and federal judiciary is *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 452 (1938). In that case Lida having first obtained a divorce in Ireland providing for payments of alimony and child support through a trust agreement from her husband was forced to seek enforcement of the agreement through the Common Pleas Court of Fayette County, Pennsylvania. This court entered a decree sustaining the agreement and removing the former husband as a trustee, fixed a lien on his partnership interests and restrained him from certain

conveyances to protect the trust fund. The trustees acting under the court's supervision proceeded to file accounting and operate under the trust agreement.

Following this, Lida and her son brought suit in equity in the United States District Court for the Western District of Pennsylvania against the trustees alleging mismanagement, praying that the trustees be removed and repay losses to the estate. The trustees presented a petition in the state court resulting in an order enjoining the petitioners from prosecuting their suit in the U.S. District Court. On the same date, the District Court rendered an opinion holding it would continue to exercise jurisdiction. The state decision was upheld by the Supreme Court of Pennsylvania, whereupon the United States Supreme Court was confronted with a situation where each of the courts claiming jurisdiction had restrained the parties before it from proceeding in the other.

The court after reviewing the problem held:

"...it is settled that where the judgment sought is strictly in personam both the state court and the federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, *if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other.* We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where

courts are brought to marshall assets, administer trusts, or liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, the court must control the property." (305 U.S. 280) (emphasis supplied)

The Court in Lida, supra, further looking to the purpose of the federal suit, found that no question was presented in the federal court as to the right of the person to participate in their res or as to the quantum of his interest in it but the contentions are solely as to the *administration and restoration of the corupus of the trust.* The court accordingly concluded:

"The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held quasi in rem, and the jurisdiction acquired upon the filing of the trustee's account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit...."

Another similar case is that of *Hutchins v. Pacific Mutual Life Insurance Company,* 20 F. Supp. 150 (S.D. Cal. 1937) affirmed 97 F. 2d 58 (9th Cir. 1938). In that case prior to any suit being filed in federal court, the state court vested title of all the assets of an insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. Subsequently, pursuant to petition of the Insurance Commissioner, the court approved liquidation of the insolvent company on the grounds that conservation was futile. The Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan after approval by the state was fully executed.

Thereafter, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire state proceeding was fraudulent and therefore, the state court lacked jurisdiction. The District Court in dismissing the federal action stated:

"This action, and the one in the state courts are actions in rem, or, at least, quasi in rem. *The relief sought is primarily concerned with the assets in question.* The rule in such cases in that *the Court first acquiring jurisdiction of the res has exclusive jurisdiction."* (20 F. Supp. 152) (emphasis supplied)

Donovan v. City of Dallas, 377 U.S. 408 (1964) does not change the rules set forth in *Princess Lida* and *Hutchins,* supra, but rather it recognizes:

"An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed."

General Atomic Company v. Felter, 434 U.S. , 98 S. Ct. 76 (1977) relied on heavily by Moody did not deal with an *in rem* or *quasi in rem* situation. Rather, that case reversed the New Mexico Supreme Court in that the New Mexico court had concluded that *Donovan,* supra:

"...precluded state courts only from enjoining litigants from proceeding further with federal suits in which jurisdiction has already attached at the time of the issuance of the injunction but permits state court injunctions against additional suits in federal courts."

II. THRUST OF PROPOSED MOODY ACTION IS WITHIN EXCEPTION TO EXERCISE OF CONCURRENT JURISDICTION.

Moody claims that the Alabama Supreme Court has ruled that state courts do have power to restrain the institution in the federal court of what plainly is an *in personam* anti-trust suit. This simply is not true. The Supreme Court of Alabama in its decision (351 So. 2d 554-555) reviewed Moody's proposed complaint to determine the relief actually sought by Moody. It found that considering the proposed complaint and the parties sought to be impleaded as defendants, there is no question the action inextricably involves the Empire receivership. Viewed as a whole, the picture is clear that the proposed action was nothing more than another ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding.

The thrust of anti-trust litigation is as stated in Section 4, of Title 15, USCA, to enjoin the violation and looks toward restraint and prohibition as the orders contemplated. Section 15 of Title 15, supra, permits suit by the individual injured to recover damages sustained. In the instant case, however, Moody seeks not merely monetary damages for an injury complained of but necessarily, revaluation of the principal asset of the Empire estate, that is, that trust placed in Empire, by Moody, and subsequently devalued by the receivership court and ancillary receivership courts.

It must be remembered that Empire went into receivership on June 29, 1972 in the State of Alabama. Preceding that order was an order of the ancillary receivership court of Arkansas, and subsequently Empire was placed in receivership in the states of Texas and Montana. All states acted under a devaluation of the principal asset of Empire, i.e. the Libbie Shearn Moody Trust. The principal receivership case in Alabama has been upheld in *Moody v. State, ex rel Payne,* Ala., 344 So.

2d 160 (1977) cert. denied, U.S. (Case No. 77428), and in Texas, *Moody v. Texas,* 538 S.W. 2d 158, (Tex. civ. app. - Waco 1976, n.r.e. 1977)

In paragraph four of Moody's proposed complaint, he names all of the former insurance commissioners of Alabama, Arkansas and Texas, being very careful to leave out the insurance commissioner of the State of Montana. Obviously, because this commissioner, who is also an ancillary receiver of Empire, has not left office. In paragraph five of Moody's complaint, he sets forth the principal thrust of his proposed law suit, that is, the devaluation of the principal asset of Empire, i.e. the life estate interest in the Libbie Shearn Moody Trust.

It is apparent, therefore, that unless res judicata apply, Moody's proposed suit of necessity must relitigate the valuation of the Empire interest in the Libbie Shearn Moody Trust, a valuation which has been placed on that trust by the courts of four states and numerous insurance commissioners past and present.

This being the principal thrust of the lawsuit, the receiver of Empire would of necessity have to defend the action, further depleting the assets of the receivership estate. If Moody were successful in his "antitrust" suit, we would be faced with two conflicting judicial valuations of the principal asset of the estate and in effect, conflicting judicial decisions as to whether or not Empire should in fact be in receivership.

CONCLUSION

By stating the issue presented for review in terms of broad state and federal constitutional guarantees and totally ignoring his track record of contemptuous abuse of civil process, Moody seeks to have this Court lift the restrictions of a valid and necessary injunction designed to protect the assets of Empire.

Moody has in virtually every court open to him, attempted to relitigate the original receivership proceeding. This attempt has been carried on since June of 1972 and has effectively prevented the final closing of the estate and distribution of the assets to the policyholders and other creditors. Moody has proven that for those wealthy enough to afford it, the process of state regulation can be ground to an effective halt.

While terming his proposed action as one "plainly" *in personam*, the facts show the real purpose to be that of relitigating the value of the principal asset of the estate of the Empire receivership, a matter which has been litigated not once but many times over.

The administration of the estate of a receivership is clearly an *in rem* or *quasi in rem* action and interference with the control over that estate cannot and should not be tolerated. The court having possession of the rest of the estate must be permitted to uphold it's dignity and orders by prohibiting unwarranted interference and relitigation of the valuation of that estate. Such interference is not purely *in personam* but is *quasi in rem* and falls within the exception to concurrent jurisdiction as noted by this Court in *Princess Lida* and *Donovan*. For these reasons the petition should be denied.

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

Proof of Service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by Counsel was filed by James W. Webb, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court of the same date the Brief in Opposition was filed.